

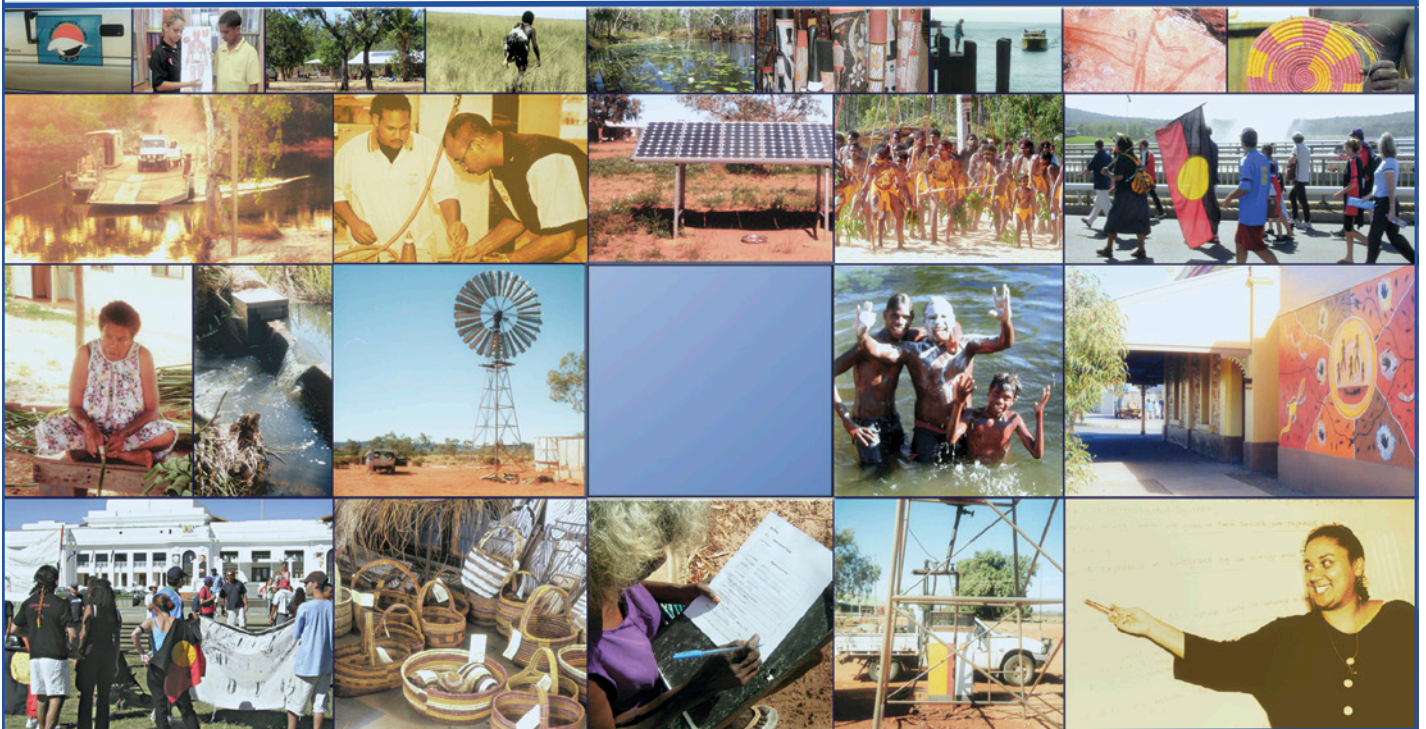
CENTRE FOR ABORIGINAL ECONOMIC  
POLICY RESEARCH



# Wild Rivers and Indigenous Economic Development In Queensland

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A version of this Topical Issue was provided as a submission to the House of Representatives Standing Committee on Economics Inquiry into Indigenous economic development in Queensland and review of the Wild Rivers (Environmental Management) Bill 2010.

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## PREAMBLE

I would like to begin with a somewhat reflexive preamble. The issues that this Inquiry looks to address are important. But they are also a little confused and conflicted. In June 2010 The Senate Legal and Constitutional Affairs Legislation Committee completed its report *Wild Rivers (Environmental Management) Bill 2010 [no.2]*. This report came out with three recommendations:

- that the Senate should not pass the Wild Rivers Bill, the majority recommendation that could be characterised as the anti-Abbott position;
- that the Senate should pass the Bill, based on a dissenting report by Coalition Senators that could be characterised as the pro-Abbott position; and
- an additional comment by the Australian Greens that the stated intent of the Wild Rivers Bill should be reflected in amendment to the *Native Title Act 1993* that could be characterised as giving national legislative coverage to the Abbott position and more effective native title rights.

I have some sympathy for all three positions.

This new Inquiry announced in October 2010 makes no mention of this earlier Inquiry but instead has greatly expanded terms of reference even though the Inquiry remains largely focused on the Wild Rivers Bill. So now the focus is not just on Wild River jurisdictions, but on the whole of Queensland, and on barriers to economic development experienced by Indigenous and non-Indigenous people, on the potential for the conservation sector to provide economic development and employment opportunity and on the effectiveness of both Queensland State and Commonwealth mechanisms to preserve free flowing rivers retaining their natural values and biodiversity. The new Inquiry does not allude to the fact that the Australian Government is in the process of developing an Indigenous Economic Development Strategy for the whole of Australia, not just Queensland.

I am in broad agreement with Noel Pearson's observation in October 2010<sup>1</sup> that this new Inquiry might constitute 'cynical tactical maneuvering' by the Gillard Government. Even with widened terms of reference, the Inquiry could be construed as an attempt to delay putting the Wild Rivers Bill to a parliamentary vote by a newly-constituted parliament, perhaps waiting for the change in the political balance of the Senate that will come about from 1 July 2011?

Nevertheless, there are serious public policy issues here that could be revisited, namely,

- what is the value of native title and land rights property, as currently constituted?
- how might such property rights be either utilised or leveraged to ensure beneficial development outcomes for Aboriginal people holding land interests?

This submission builds on my earlier submission dated 31 March 2010 to the Senate Legal and Constitutional Affairs Legislation Committee (a version of which was made available as *CAEPR Topical Issue No. 2/2010*). My focus will be on the issues above as they articulate with the new Terms of Reference.

I do this partly because I have received invited and uninvited comment on my earlier submission; and an unusually high level of engagement, some quite robust, with a range of stakeholders directly and indirectly impacted by the Wild Rivers Bill including: spokespeople or leaders from the Cape York Land Council, Cape York Institute, Balkanu Cape York Development Corporation, Chuulangun Aboriginal Corporation, Carpentaria Land Council Aboriginal Corporation, Anglican Church Diocese of Brisbane, the Wilderness Society, and the Australian Greens.

My aim is to try and assist the Inquiry with an academic perspective informed by my disciplinary background in economics and anthropology and more recent interests in political ecology and critical development studies, alongside more than 30 years of practical research experience in remote Indigenous development. My principal long-standing research interest of particular relevance to this Inquiry is on the issue of property rights; my policy-related goal is to advocate for greater clarity in property rights associated with lands owned and managed by Aboriginal people under land rights and native title laws, and to highlight the need for the leverage that such property rights might provide Indigenous land owners to be maximised in the interest of enhanced Indigenous empowerment and development.

There are two critical comments (that are arguably interlinked) to my earlier submission that have emanated from some influential Cape York spokespeople who oppose the Queensland *Wild Rivers Act 2005* and support the Commonwealth's Wild Rivers Bill 2010.

The first is that my aspiration to see a greater consistency both between land rights and native title laws and between all States and Territories in Australia is aiming too high and undermining a political campaign focused on Cape York. In my view geographic exceptionalism, whether it be Cape York or Queensland, is a poor basis for sound national policy making.

The second is that I have not broadly consulted Aboriginal land owners affected by the Queensland *Wild Rivers Act* nor have I physically inspected declared wild river catchments. This observation is factually correct, although as noted above I have had direct verbal and written interactions with many key Aboriginal spokespeople. I have also in the past undertaken research on tourism on the Cape and the impacts of mining in the Gulf. More recently, I have actively participated in the major CSIRO-led scientific study for the Northern Australia Land and Water Taskforce that incorporates tropical Queensland and was the lead author of a chapter in the *Northern Australia Land and Water Science Review Full Report October 2009*.<sup>2</sup> In the course of my career I have researched economic possibilities provided by tourism, the visual

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1. See <<http://www.abc.net.au/news/stories/2010/10/01/3026814.htm>>.

2. See <[http://www.nalwt.gov.au/files/Chapter\\_07-Indigenous\\_interests\\_in\\_land\\_and\\_water.pdf](http://www.nalwt.gov.au/files/Chapter_07-Indigenous_interests_in_land_and_water.pdf)>.

arts, mineral extraction, commercial utilisation of wildlife, the services sector, the conservation economy and emerging opportunities in the carbon economy in north Australia. My current research is focused on development in both the conservation economy and the hybrid economy; this research highlights livelihood possibilities and opportunities rather than any ambitious goal to close economic gaps according to mainstream social indicators.

I provide this somewhat prolix and reflexive preamble because of the conflicted and highly politicised nature of the important Wild Rivers debate and this Inquiry; under such circumstances it can do no harm to attempt personal transparency.

## INTRODUCTION

This Inquiry and its terms of reference seek to address two interrelated issues. At a broad level, there is a focus on Indigenous economic development in Queensland, without any explanation why this particular focus by the House Standing Committee on Economics is required. Queensland an estimated resident Indigenous population of 146,000; some 28 per cent of the nation-wide Indigenous population and the second largest after New South Wales. An analysis of standard social indicators indicates that Indigenous people in Queensland are not especially disadvantaged when compared with other Indigenous Australians. Furthermore, the Australian Government is in the process of developing an Australia-wide Indigenous Economic Development Strategy, so arguably this special focus on Queensland is unwarranted. The second issue is review of the Wild Rivers (Environmental Management) Bill (henceforth the Wild Rivers Bill) tabled by the Opposition Leader the Hon AJ Abbott in November 2010; this has already been the subject of an Inquiry by the Senate Legal and Constitutional Affairs Legislation Committee which completed its report *Wild Rivers (Environmental Management) Bill 2010 [no.2]* in June 2010. The current Inquiry seeks to subsume the Wild Rivers Bill under the broader ambit of Indigenous economic development in Queensland, but the connection between the two is far from clear.

More specifically, in looking to examine the scope to increase sustainable Indigenous economic development in Queensland (including the Cape York region, which obviously is a part of Queensland) the House Standing Committee on Economics is asked to consider existing Commonwealth and Queensland State environmental regulations; the impact that the Wild Rivers Bill would have, if passed; and options for facilitating economic development that will benefit Aboriginal people and protect the environment. More specifically again, the Inquiry is asked to pay particular attention to current barriers to economic development and land use for Indigenous and non-Indigenous people in Queensland in a range of industries; how to reduce such barriers; the potential of environmental management to provide economic opportunity for Indigenous people, the effectiveness of current mechanisms to preserve free-flowing rivers (not just in declared Wild River areas), options for improved environmental regulation; and finally, the impact of such environmental regulations, mining legislation and other relevant legislation on native title rights in Queensland and nationally and the impact that passage of the Wild Rivers Bill might have on these matters.

These are very complex terms of reference that I cannot comprehensively address. Instead my submission takes the form of commentary on four issues, property rights, Indigenous economic development in Queensland, empirical evidence on development options, and practical implementation considerations that all have relevance to the Inquiry's terms of reference. I make one recommendation on each before ending with a conclusion. Like the Inquiry's terms of reference, the four issues that I address are interlinked, although my greater emphasis is on the Wild Rivers Bill than on Indigenous economic development in Queensland.

## PROPERTY RIGHTS

The Queensland *Wild Rivers Act (2005)* allows the state government to make wild river declarations to preserve the natural values of rivers. Such declarations only occur after community consultations, but neither the community nor land owners in a proposed wild river area have a right to veto such a declaration. In the parlance of the native title system, communities and land owners only have a 'right of consultation'.

Mobilising the language of special beneficial measures and article 26 of the UN Declaration on the Rights of Indigenous Peoples, the Wild Rivers Bill seeks to bestow special beneficial property rights on what are termed 'traditional owners of Aboriginal land within a wild river area'. It is noteworthy that the term 'traditional owner' is not defined in the Bill, with the term 'owner' preferred. Indigenous land owners are defined in relation to seven forms of tenure under Queensland law and one form of tenure under Commonwealth native title law.

As constitutional expert Professor George Williams notes in his submission [no.1] to the Inquiry the identification of the Bill as a special measure for the advancement and protection of Australia's Indigenous people is constitutionally valid. Beyond this, the Wild Rivers Bill has two main objects described in s 4 and s 5. The first at s 4 (3) is to 'protect the rights of traditional owners of Aboriginal land to own, use, develop and control that land'. The second at s 5 is to require the agreement of land owners: 'The development or use of Aboriginal land in a wild river area cannot be regulated under the relevant Queensland legislation unless the owner agrees in writing'.

These two objects together take the property rights of owners of Aboriginal land within a wild river area to a level that is unprecedented in Australia.

The need to obtain the agreement of the land owner or owners in writing prior to the declaration of a wild river area as outlined in s 5 is a form of free prior informed consent. This has a parallel in the operations of the Commonwealth *Aboriginal Land Rights (Northern Territory) Act 1976* where the agreement of traditional owners as defined in that statute is required before a development can occur on Aboriginal-owned land. Even these consent provisions have limits as they can be overruled by national interest provisions, compulsory acquisition for a legitimate public purpose and, as occurred in the case of the NT Intervention, compulsory leasing of prescribed townships contingent on the payment of just or reasonable terms compensation.

The rights of (traditional) owners of Aboriginal land to own, use, develop and control that land as described in s 4 (3) has strong resonance with the wording of Article 26 (2) of the UN Declaration that states 'Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired'. Paradoxically perhaps, it was the Rudd Government that endorsed the UN Declaration in April 2009, yet opposed the Wild Rivers Bill in the Senate Committee Report of June 2010. On the other hand, members of the Abbott Opposition that had opposed the UN Declaration in September 2007 in the UN General Assembly are now not only borrowing some of its wording but are also looking to weave the intent of an article of the Declaration not binding in law into Australian domestic law.

Unlike Article 26 (2), the Wild Rivers Bill does not include the word 'resources' and so is a little ambiguous about property rights in resources on Aboriginal land in a wild rivers area. Of particular significance would be ownership of commercial assets like sub-surface minerals, fisheries, water and carbon offset or sequestered on Aboriginal-owned land. I will leave it to legal experts to debate if explicit reference is needed to resources beyond use, development and control of land.

One interpretation of the combination of s 4 (3) (a) and s 5 of the Wild Rivers Bill is that a form of sovereignty is provided to traditional owners of Aboriginal land within a wild river area.



What is unclear in the Bill, and this is a comment that I made in my original submission<sup>3</sup> is why such potentially powerful property rights are limited to traditional owners of land 'within wild river areas'. It is as if after being subject to a wild river declaration under the *Wild Rivers Act 2005 (Qld)* after a consultation process with all land owners and residents of a proposed wild river catchment, Aboriginal land owners will be especially empowered with a special form of property that is not available to any other native title interest (or non-Indigenous land owner) anywhere else in Australia. This is somewhat confusing on two grounds.

First, it could establish a form of moral hazard whereby Aboriginal land owners might perversely seek wild river declaration under Queensland legislation so as to trigger a Commonwealth override that will provide unprecedented property rights over their land. This would be an unusual source of additional property rights.

Second, assuming a wild river declaration is only made over land with high natural values, it would result in those with the most intact lands and rivers gaining the greatest leverage to either exploit or conserve these lands unencumbered by additional regulations. As argued in my original submission, it might just be preferable to strengthen the property rights guaranteed to native title holders or claimants under the Commonwealth Native Title Act (and other Aboriginal land owners under Queensland laws), a position that was supported by the Australian Greens in their Additional Comments in the Senate Committee Report.

It should be recognised that there are some fundamental weaknesses in the current Native Title framework that would benefit from clearer definition of property rights.

First, in the native title system, claim groups are put to proof on every right that they assert. Hence while in my early submission I noted that the *Wild Rivers Act 2005 (Qld)* complies with s 211 of the *Native Title Act 1993 (Cth)*, so that customary rights on native title lands are maintained, the 'bundle of rights' approach taken by the High Court in *Western Australia v Ward* (2002) might compromise the rights to use and control resources approach taken earlier in *Yanner v Eaton* (1999). It is again unclear if the Wild Rivers Bill is suggesting that if an Aboriginal land owner in a wild river area opposed extraction of minerals, the assertion by the crown of property in minerals that has been interpreted by the High Court as permanently extracted from native title would be over-ruled? In her book *Compromised Jurisprudence* (2009) Lisa Strelein notes the inconsistency in reasoning between the Yanner and Ward decisions. Even establishing a right to trade in resources is difficult to prove in the current native title system.

Second, in the native title system, there are a range of procedural rights with the gold standard of free prior informed consent being currently absent. In my earlier submission I noted a lesser set of rights ranging from a right to negotiate to a right of consultation, but this range excluded even lesser 'rights' to be notified or to comment. Such a range of limited rights is clearly unsatisfactory and hardly accord with articles in the UN Declaration on the Rights of Indigenous Peoples. So in principle it is important that procedural rights under the native title system be both strengthened and made more consistent, irrespective of jurisdiction.

**Recommendation 1:** Taken at face value, and as a matter of principle, the Wild Rivers Bill should be supported because it looks to empower Aboriginal land owners with an unprecedented form of property as a special measure for their advancement and protection. The Bill though should be extended beyond wild river areas to all parts of Australia as proposed by the Australian Greens in their draft Native Title Amendment (Reform) Bill 2011.

3. A version of this submission was published as CAEPR *Topical Issue No. 2/2010*, available at <<http://caepr.anu.edu.au/Publications/topical/2010TI2.php>>.

## INDIGENOUS ECONOMIC DEVELOPMENT IN QUEENSLAND

As noted above, it is unclear to me why there is a specific focus on Indigenous economic development in Queensland unless the issue is related to the ten wild river areas already declared (with four on Cape York) and three proposed for the Channel Country (where there is little Aboriginal ownership of land according to existing Australian laws). To reiterate there is potential interstate inequity here.

Rather than rehearse the range of issues that I addressed in my submission<sup>4</sup> in response to the Australian Government's Indigenous Economic Development Strategy Draft for Consultation (henceforth the draft IEDS). I will highlight just three issues, two drawn from the earlier submission.

### IEDS:

Indigenous  
Economic  
Development  
Strategy

### DEFINING 'ECONOMIC DEVELOPMENT'

Just like the draft IEDS, the terms of reference for this Inquiry deploy the term 'economic development' in a variety of ways as if an uncontested term. At the start there is reference to the issue of sustainability and the aspirations of Indigenous people and the social and cultural context surrounding their participation in the economy. Later there is reference to economic development and land use and the identification of key industries, mining, pastoral, tourism, cultural heritage and environmental management. Next there is reference to industries which promote preservation of the environment and the role that they might play to provide economic development (as an outcome or a process?) and employment. Such broad notions of development that countenance opportunity beyond the mainstream economy strongly accord with my views of economic development as a social process to enhance the capacity of actors and communities to improve their well-being, and in my view are to be encouraged. Such notions also shift from too much focus on Indigenous deficits and a greater recognition of Indigenous assets (including land held under restricted common property regimes) that can be utilised to improve well-being.

What is surprising about these notions of economic development, however, is that no mention is made either of COAG's Closing the Gap targets, nor of the National Indigenous Reform Agenda nor of the Cape York Institute's well-publicised reform agenda to promote the 'real' (or free market) economy in the Cape York region. Even at the local level, there are indications that Local Implementation Plans required for the 29 priority communities (of which there are four in Queensland—Aurukun, Hopevale, Coen, and Mossman Gorge—although none has published an LIP as yet) will focus on forms of economic development that prioritise Closing the Gap even at the local level. It seems that broad goal setting from the top down at a national level is destined to drive local planning, at least in priority communities.

As referenced in *CAEPR Topical Issue No. 3/2011*, Edelman and Haugerud note in the book *The Anthropology of Development and Globalization* that 'development' is an unstable term that is highly ambiguous. This certainly appears to be the case in contemporary Indigenous affairs policy making, where the term 'economic development' is adaptively managed to address particular regional or political issues or particular audiences.

### THE HYBRID ECONOMY

Even though the Inquiry's terms of reference seek to broaden the notion of economic development, there still seems to be an antipathy to acknowledging that customary or non-market activity and kin-based relations of production might make important contributions to livelihood. In making this observation I am not trying to either romanticise the customary sector or suggest that there is any Indigenous aspiration to return to a pre-colonial way of living. What I highlight in my work using the hybrid economy framework and the notion of interculturality is that many Indigenous economies in Queensland (and elsewhere) live

4. A version of this submission was published as *CAEPR Topical Issue No. 3/2011*, available at <<http://caepr.anu.edu.au/Publications/topical/2011TI3.php>>.



the reality that there is a customary sector interacting with market and state sectors; and that there are ongoing tensions between individualistic market-focused economic norms and community-focused, kin-based economic norms.

The notions of economic hybridity and interculturality might appear abstract and theoretical but they capture quite accurately and evocatively the development debates that are being very publicly articulated in the popular media by a diversity of Indigenous stakeholders, many of whom have made submissions to this Inquiry. At one extreme some groups want to replicate late capitalist forms of economic development in wild river areas, and at the other extreme some groups want to give priority to customary use of resources and to the environmental management of relatively undisturbed river and coastal systems. In between are some who want a mix of both.

I would add the following comments that are not new and have been promulgated for over a decade to highlight the realism on which the hybrid economy model is based. If policy continues to ignore the customary sector and the resilience of distinct Indigenous social norms, then the Indigenous economic development problem will continue to be misunderstood and proposed solutions mis-specified. This is already evident, for example, in the Australian Government's commitment to radically reform the Community Development Employment Program (CDEP) because it is erroneously and negatively perceived to hamper engagement with the mainstream labour market rather than positively as an enabler of remote livelihood possibilities in the hybrid economy. It is after all the highly variable interactions between customary, state and market sectors of hybrid economies from place to place that give them distinction and potential comparative advantage. The extent of Indigenous economic disadvantage suggests that livelihood improvement will require the mobilisation of productive activity not just in market, state and customary sectors (no sector being privileged in the hybrid economy framework over another) but also in the often most productive segments of overlap between the three sectors.

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**CDEP:**  
Community  
Development  
Employment  
Program

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## DEVELOPMENT CONTESTATION

In recent thinking I have come to realise the inevitability of contestation over the nature that economic development might take on the Indigenous estate, which now covers 1.7 million sq kms, over 20 per cent of Australia. To claim land under Australian western laws, Indigenous claimants need to legally demonstrate tradition, continuity and connection. Flowing from this required legalistic approach to reclaiming land is a discourse of conservation and emerging forms of conservation practice that is enabled by the restricted or limited or community common property regimes (or to use the terminology of 2009 Nobel Laureate Elinor Ostrom, 'common-pool resources') that land rights and native title law bequeath successful claimants. Importantly, the Indigenous estate that has historically had low commercial value owing to its remoteness and lack of suitability for agriculture now has great mineral prospectivity and conservation value.

To simplify considerably and rather crudely, Indigenous groups that have regained their ancestral lands now face two broad options: participate in the land's exploitation, especially through mining, or participate in its conservation, often as a part of the National Reserve System. This is a stark choice. It is not surprising that within the Indigenous domain there are diverse responses to such development challenges. Some argue for rights to exploit their land commercially so as to attain mainstream economic improvement to create wealth; others seek to conserve lands in accord with tradition and for future generations in the name of livelihood improvement. Again there are others who believe that it is possible to do both, and such possibilities can certainly be accommodated in the hybrid economy.

**Recommendation 2:** The Australian Government is conflicted and inconsistent in its use of the term 'economic development', as evident for example in the contrast between its use in the COAG National Indigenous Reform Agreement and the draft Indigenous Economic Development Strategy (where development is often equated with mainstream employment) and in the terms of reference for this Inquiry (where development is given a wider meaning). Some considerable effort should be invested in unpacking the diverse meanings of Indigenous economic development, giving high priority to garnering the perspectives of Indigenous people, who are all too often treated by political and bureaucratic processes as passive subjects of the state project of improvement.

## EMPIRICAL EVIDENCE ON DEVELOPMENT OPTIONS

A number of this Inquiry's terms of reference allude to barriers to Indigenous economic development and the potential of diverse industries. There is no shortage of information about the structural barriers and community-by-community shortfalls that impede Indigenous economic development. And of course as a new regulatory regime, the Queensland *Wild Rivers Act (2005)* constitutes an additional barrier as it seeks to limit development in High Preservation Areas and impose a decision-making regime with a discretionary bias that prioritises the environmental values of relatively undisturbed river systems. Yet actual or perceived barriers can rapidly transform into sustainable economic development opportunity, as evident by the provision of employment opportunities for Indigenous rangers in wild river areas provided by both the Queensland Government and by the Australian Government under its Working on Country program. The current and potential importance of this work has become so significant that the Wild Rivers Bill at s 4 (3) (b) guarantees that if the Bill be enacted, existing employment in the management of a wild river area will be maintained by the Commonwealth Government.

To get a good sense of economic development options for Indigenous people in Queensland there are a number of methods that can be deployed. The most important and potentially useful for development planning is to undertake an assessment of potential opportunity from a diversity of disciplinary perspectives at a region-by-region or catchment-by-catchment levels. Such an approach will tell us about production possibilities, known knowns that would then need to be matched against diverse Indigenous aspirations and capabilities. Of course over time, the known knowns will become known unknowns and unknown unknowns, aspirations will change and capabilities will expand if the state fulfils its role of getting the foundations right (see 'The proper role of the state' in *CAEPR Topical Issue No. 3/2011*, p. 8). The collection of such primary information and its analysis will take time and investment and is unlikely to be undertaken or completed during the life of this Inquiry.

The Inquiry is therefore left with four other possible approaches: to examine existing empirical information on current development options; to look at historical sources; to look at comparative material; and to look at any prognostic material that might be available. I want to provide brief comment on each option.

### RECENT RESEARCH

In 2009 the North Australia Land and Water Task Force commissioned a comprehensive review of northern Australian land and water science. Referred to as the *Northern Australia Land and Water Science Review 2009*,<sup>5</sup> the project was coordinated by CSIRO in collaboration with over 80 of Australia's leading scientists working on northern land and water issues. The Science Review represents the most comprehensive and thorough review ever undertaken of conventional science and knowledge of issues relevant to the sustainable development of northern Australian land and water. While the Science Review did not cover all of Queensland, it certainly covered the tropical north where current wild river areas are declared. I

5. See <[http://www.nalwt.gov.au/science\\_review.aspx](http://www.nalwt.gov.au/science_review.aspx)>.

cannot do justice here to a report that extended well over 1,000 pages (although it does have a 10 page executive summary), but merely want to note that it cast doubt about the commercial potential of north Australia, mainly on the basis of soils, water storage and climatic limitations, but also on the basis of the interdependence of surface and ground water and commercial and environmental flows. I also need to declare that I contributed to this report and can attest to its rigour and careful peer review.

I highlighted this research in some critical commentary provided on invitation to the Social Responsibilities Committee (SRC) of the Anglican Diocesan of Brisbane, who produced two comprehensive reports: *Wild River Policy: Likely Impact on Indigenous Well-Being* (August 2009) and *Wild Rivers Policy: Likely Impact on Sustainable Development* (September 2010). I am sure that the SRC will make a submission to this Inquiry (as they did to the earlier Senate Inquiry of last year) that will table the second report. I do not want to take issue with their perspective that the *Queensland Wild Rivers Act* provides a regulatory brake on commercial development and that this may disadvantage some Aboriginal land owning groups (after all, I make a similar point above). What I do want to highlight is that there is some excellent, comprehensive and up-to-date research available that should be seriously considered by this Inquiry and others providing submissions.

## HISTORICAL RESEARCH

There is some excellent historical research available that looks at changes in Australia's Tropical Savannas over the past 35 years. Much of this research has been undertaken by eminent Queensland geographer Emeritus Professor John Holmes, who has made separate submission to this Inquiry. I want to highlight just three of his recent publications: 'The Multifunctional Transition in Australia's Tropical Savannas: the Emergence of Consumption, Protection and Indigenous Values' (*Geographical Research* August 2010, 48 (3): 265–280); 'Divergent Regional Trajectories in Australia's Tropical Savannas: Indicators of a Multifunctional Rural Transition' (*Geographical Research* August 2010, 48 (4): 342–358); and 'Contesting the Future of Cape York Peninsula' (*Australian Geographer* March 2011 (forthcoming)). To summarise briefly, Professor Holmes documents what he terms a 'multifunctional transition' in Australia's tropical savannas. Associated with tenure changes there has been a shift from the dominance of production values (pastoralism and mining) to a greater complexity and heterogeneity in regional economies in which a mix of consumption (tourism) and protection (conservation) values have emerged. In his article on Cape York—which has been in press for nearly a year and that I referred to in my early submission to the Senate Inquiry<sup>6</sup>—Professor Holmes provides a very nuanced account of a prolonged development debate on Cape York, highlighting the current pivotal divide between what he terms traditionalist/localist versus modernist/regionalist visions of Indigenous futures. These are not dissimilar to my distinctions between different forms that economic hybridity and interculturality can take as outlined above.

## COMPARATIVE RESEARCH

There is significant comparative research from elsewhere in Australia that could assist this Inquiry address its terms of reference, especially in its industries focus. Again I do not seek to summarise this literature but merely focus on two projects, one that I have recently been involved in and the other that is currently underway. The first looked at some cases of Indigenous involvement in a small sample of major mines across north Australia. This research has been summarised in a research monograph *Power, Culture, Economy: Indigenous Australians and Mining* (2009).<sup>7</sup> The research demonstrates that the spin-off benefits for Indigenous land owners from mining can be highly variable. The second is a current project that examines the livelihood benefits that can accrue to Indigenous land owners from the provision of environmental

6. See CAEPR *Topical Issue No. 2/2010*, available at <<http://caepr.anu.edu.au/Publications/topical/2010T12.php>>.

7. See <[http://epress.anu.edu.au/c30\\_citation.html](http://epress.anu.edu.au/c30_citation.html)>.

services. A great deal of material on this project can be sourced at the People on Country, Healthy Landscapes and Indigenous Economic Futures website.<sup>8</sup> The research highlights that there is potential in industries which promote the preservation of the environment and in the abatement of carbon with support from public, philanthropic and private sectors, the last on a commercial basis.

### PREDICTIVE RESEARCH

Some current research has a degree of predictive power, though with obvious possibility of error, and I provide just two examples. In 2009 the Department of Climate Change commissioned research that sought to assess the risks from climate change to Indigenous communities in the tropical north of Australia. This report (released in April 2010)<sup>9</sup> made climate change projections to 2030 and 2070 and then assessed threats as well as mitigation and development opportunities for Indigenous communities. More recently, Professor Holmes has been building on his historic work in unpublished research that turns to the future. He examines the 'occupance mode' and 'trajectory' for Cape York across four points in time: 1970, 1990, 2010 and 2030. He predicts that the future 'occupance' mode will be complex multifunctionality with pre-eminent Indigenous engagement, with a trajectory consisting of 'modest increments in production and consumption values and further entrenchment of protection values, with the production values pursued mainly by modernist Indigenous leadership, protection by traditionalist leadership and consumption by both' (John Holmes, e correspondence, 1 December 2010).

**Recommendation 3:** A body of current, historic, comparative and predictive research on development options in north Australia and in Queensland be brought to the attention of the House Standing Committee on Economics. I am not suggesting that all this research is of equal quality, nor am I suggesting that empirical evidence is ideology free. What I am recommending is that this considerable body of published research is considered as much as possible in this Inquiry.

### PRACTICAL IMPLEMENTATION CONSIDERATIONS

One of the key issues for this Inquiry is what would be the impact if the Wild Rivers Bill was passed and what might be the impact of passage on other laws including the national native title regime. I interpret this as a legitimate governmental concern about how s 5 of the Wild Rivers Bill that requires the agreement of the owner(s) of a wild river area to agree in writing to any regulation of Aboriginal land in a wild river area. Many questions arise here: Who has to give consent? All members of a land owner group by consensus? An elected or self-proclaimed leader of the 'traditional owners'? The applicants (if it is a native title claim group) or the prescribed Body Corporate (if it is a determined group)? What if there are overlapping claim groups?

To give this issue some context, in the original Wild Rivers Bill tabled by Senator Scullion in the Senate in early 2010 there was no definition of traditional owner. In the revised Bill tabled by the Hon. AJ Abbott in the House in November 2010 this oversight is corrected with a very broad notion of ownership used: as noted above ownership is equitably defined across eight different legal regimes and in principle such equity might be welcomed. However, it is noteworthy that this new definition excludes native title claimants or groups who might have completed a land use agreement as an alternative settlement.

8. See <<http://caepr.anu.edu.au/poc/index.php>>.

9. See <<http://www.climatechange.gov.au/en/media/whats-new/risk-from-climate-change-to-indigenous-communities-tropical-north-australia.aspx>>.

However, the mechanism that will be required to secure land owner agreement is not specified in the Wild Rivers Bill except at s 6 with respect to native title holders as defined under s 224 of the *Native Title Act 1993*. One practical problem here is that claimants appear to be excluded. Another is that the mechanisms to obtain agreements of other categories of owner are unspecified, with such practical matters being left under s 8 for regulations that may prescribe procedures for seeking the agreement of an owner under this Act. This failure to address practical implementation considerations is potentially highly problematic. Again many questions arise owing to this lack of specificity: Does there have to be negotiation in good faith? Will consultations result in legal action over allegations of duress or unconscionable conduct? Will such practical problems perversely encourage the Queensland Government to compulsorily acquire wild river areas?

Given that a wild river declaration has the principal objective to protect the environmental values of relatively undisturbed river systems, whole of catchment consensus will be needed to support a declaration. In some situations such consensus might be forthcoming: this may already be the case in some wild river declarations even though such consensus was not a statutory requirement. But it is likely that when the written agreement of owners is required the practical basis for gaining agreement will become considerably messier, bearing in mind that a declaration needs to cover an entire river system to be ecologically effective.

There is an emerging literature on the social effects of native title<sup>10</sup> that highlight the divisions that the native title process can create. I do not so much want to engage with this literature as to raise awareness of how difficult it can be to gain consensus among land owners. For example, I have undertaken research recently in fresh water rights in western Arnhem Land where a number of entire river catchments sit within the Arnhem Land Aboriginal Land Trust. In some parts of Arnhem Land traditional owners are collaborating to protect the environmental values of river systems through collaborative natural resource management activities. Such activities can be formalised through the declaration of Indigenous Protected Areas. In September 2009, over 100 traditional owner groups reached consensus to allow the declaration of the Djelk Indigenous Protected Area over an area of 6,672 sq kms. This is a region where there is only one tenure system, inalienable Aboriginal freehold title, with a form of free prior informed consent as being proposed in the Wild Rivers Bill. Even here the process for declaration took several years of consultation and constructive engagement managed by the regional Bawinanga Aboriginal Corporation.<sup>11</sup>

In my view, reaching the agreement needed under s 5 to allow the declaration of a wild river in Queensland will be far more complicated (and hence protracted and costly) than in the above Arnhem Land case. This is because forms of land tenure are more diverse and fragmented in Queensland and because there is often a mix of Indigenous and non-Indigenous land owners and a mix of community members and land owners. Customary law is likely to privilege some land owners over other interests, but a catchment is unlikely to be the domain of just one group, and so some level of contestation is highly likely.

Similarly, as noted above, it is unclear why it will only be Aboriginal owners of land within a wild river area who will benefit from the special property rights being proposed in the Wild Rivers Bill.

In making these practical observations, I am not suggesting that practical obstacles should override matters of principle. But what I am suggesting is that the likely practical implementation problems in the Wild Rivers Bill be addressed before it becomes law rather than after.

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10. See <[http://eprint.anu.edu.au/c27\\_citation.html](http://eprint.anu.edu.au/c27_citation.html)>.

11. See <[http://caepr.anu.edu.au/system/files/cck\\_misc\\_documents/2010/09/Djelk%20Annual%20Report%202010%20web.pdf](http://caepr.anu.edu.au/system/files/cck_misc_documents/2010/09/Djelk%20Annual%20Report%202010%20web.pdf)>.

**Recommendation 4:** Careful consideration needs to be given to the mechanisms that will be used to secure the free prior informed agreement of land owners to a wild river declaration; and what mechanism will trigger the special property rights proposed for owners of Aboriginal land within a wild area.

## CONCLUSION

The broad area of Indigenous policy is probably more politicised and complicated than any other in Australian society. Achieving sound policy reform can be very difficult, and is often dependent on a serendipitous moment when ideologies, evidence, cogent arguments and interest group politics coincide. While the House Standing Committee on Economics Inquiry is ostensibly about Indigenous economic development in Queensland, it appears to be driven by the tabling of a private member's bill, the Wild Rivers (Environmental Management) Bill 2010, in the Australian House of Representatives by the Hon. A.J. Abbott. This is an unusual process for policy reform and by its very nature is likely to politicise the decision making both at the national parliamentary level and also at the regional and Queensland state level.

Nevertheless, whether intended or not, the Wild Rivers Bill raises some important issues about the value of Aboriginal land ownership if unaccompanied by effective property rights to allow choice about the form that development might take; and which requires the informed consent of land owners in relation to use of their land that might be made or regulated by third parties, including state parties. It is salutary to consider that in 1974 in the *Aboriginal Land Rights Commission Second Report* the late Mr Justice Woodward noted in relation to the right of veto that to deny Aboriginal land owners the right to prevent commercial development (mining) on their land is to deny the reality of their land rights. The same principle can be readily extended to imposed conservation on Aboriginal-owned land.

As the Australian nation and Indigenous people ponder the appropriate means to deliver development or close gaps or improve livelihoods for the marginalised, it might be opportune to use this Inquiry to explore a multi-partisan means to deliver consistent, free, prior informed consent rights to all Indigenous people who own land under restricted or community common property regimes as currently only occurs in the Northern Territory under Commonwealth land rights law; and how to strengthen property rights in land, its use, its development and control as recommended by the UN Declaration on the Rights of Indigenous Peoples. Some might see the passage of the Wild Rivers Bill as an initial mechanism to achieve such ends. Others might feel that an alternative approach that does not raise the spectre of disputation over Queensland State rights might require a focus on the native title system. Whichever of these two avenues is pursued, this is not the time for a hurriedly drafted and poorly considered law that will likely prove unworkable. There are serious policy issues at stake that deserve considered and constructive debate, Indigenous input, and resolution.